Puan Sri Sabariah bt Mohd Shariff v Azhar Azizan bin Harun & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCVC-177–02 OF 2019
SM KOMATHY J
7 MAY 2019

Constitutional Law — Election — Election Commission — Quorum of the Election Commission — Whether all seven members must be present to constitute a quorum — Federal Constitution arts 114(1), (7), 160 & s 33C of the Eleventh Schedule

Election — Election Commission — Quorum — Whether all seven members must be present to constitute a quorum

This was an action brought by the plaintiff to determine whether an Election Commission meeting that was convened on 18 January 2019 was held in violation of art 114(1) of the Federal Constitution ('the Constitution') as the chairman was the sole person present at the meeting as the other members of the Election Commission had resigned and their vacancies had not been filled at the time. The plaintiff sought for the following declarations: (a) that the Election Commission was an unconstitutional entity from 1 January–8 February 2019 in violation of art 114(1) of the Constitution; (b) that the meeting of the Election Commission held on 18 January 2019 and chaired by the chairman without the deputy chairman and five other members was unconstitutional for violating art 114; and (c) that the decisions taken at the said meeting were unlawful and not enforceable. The plaintiff submitted the following: (i) on a proper construction of art 114(1), the Election Commission as an entity under art 114(1) was only lawful if it consisted of the seven members stipulated therein; a chairman, a deputy chairman and five other members; (ii) the Election Commission at the date of the impugned meeting was not validly constituted as it consisted only of the chairman; (iii) the chairman of the Election Commission could not carry out any of the constitutional functions of the Election Commission on his own. In the absence of a quorum provision, all seven members must be present in order to make a valid decision; and (iv) the court should decline to follow the decision of the Court of Appeal in *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656 that all seven members of the Election Commission need not be present as the Court of Appeal had failed to examine and consider the critical words in s 33C in the Eleventh Schedule. The defendants on the other hand submitted that: (1) the construction given by the plaintiff to art 114

was erroneous as it was based on considering art 114(1) in isolation, it was an established cannon of constitutional construction that the Constitution must be read as a whole and not in isolation to ascertain its meaning. It was said that art 114 must be read together with art 160(1) and s 33C of the Eleventh Schedule to the Constitution as was decided in *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors*; and (2) if Parliament had intended that all seven members must be present, it would have included a quorum provision to specify the number of its members which were to constitute a quorum.

Held, dismissing the application with no order as to costs:

(1) The absence of any such quorum provision in art 114 (1) pointed strongly to the view that Parliament did not think it necessary to make such a provision. The reason why Parliament had not prescribed a quorum in art 114(1) was to give the Election Commission business efficacy to ensure that its power and proceedings were not affected by any vacancy that may arise. The Election Commission had a statutory duty, among others to conduct elections within specified time lines. The construction given by the plaintiff to art 114(1) would lead to impractical, if not absurd, results as the work of the Election Commission would frequently be brought to a standstill if all seven members must be present (see para 13).

[Bahasa Malaysia summary

Ini merupakan satu tindakan yang dibawah oleh plaintif untuk menentukan sama ada satu mesyuarat Suruhanjaya Pilihanraya yang diadakan pada 18 Januari 2019 telah melanggar peruntukan perkara 114(1) Perlembagaan Persekutuan ('Perlembagaan') kerana pengerusi merupakan satu-satunya individu yang hadir di mesyuarat tersebut memandangkan ahli lain Suruhanjaya Pilihanraya telah meletakkan jawatan dan kekosongan tersebut tidak di isi pada waktu itu. Plaintif menuntut untuk deklarasi berikut: (a) bahawa Suruhanjaya Pilihanraya merupakan entiti yang tidak selaras dengan perlembagaan diantara 1 Januari–8 Februari 2019 kerana melanggar perkara 114(1) Perlembagaan; dan (b) keputusan yang dibuat sewaktu mesyuarat tersebut adalah salah disisi undang-undang dan tidak boleh dikuatkuasakan. Plaintif telah berhujah seperti berikut: (i) berdasarkan konstruksi sebenar perkara 114(1), Suruhanjaya Pilihanraya merupakan satu entiti di bawah perkara 114(1) hanya sah sekiranya ianya terdiri daripada tujuh ahli sepertimana ditetapkan; satu pengerusi, satu timbalan pengerusi, dan lima orang ahli lain; (ii) Suruhanjaya Pilihanraya sewaktu tarikh mesyuarat yang diabar tidak dibentuk lengkap kerana ianya hanya terdiri oleh pengerusi; (iii) pengerusi Suruhanjaya Pilihanraya tidak boleh menjalankan fungsi mengikut Perlembagaan Suruhanjaya Pilihanraya dengan sendiri. Dalam ketiadaan peruntukan koram, kesemua tujuh ahli hendaklah hadir untuk membuat keputusan yang sah; dan (iv) mahkamah harus tidak mengikuti

keputusan Mahkamah Rayuan dalam *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656 yang memutuskan bahawa kesemua tujuh ahli Suruhanjaya Pilihanraya tidak perlu hadir kerana Mahkamah Rayuan gagal untuk mengamati perkataan kritikal dalam s 33C Jadual Kesebelas. Defendan pula menghujahkan bahawa: (1) tafsiran yang diberi oleh plaintif kepada perkara 114 adalah salah dan ianya berdasarkan pembacaan perkara 114(1) secara berasingan, adalah merupakan asas pentafsiran perlembagaan bahawa Perlembagaan perlulah dibaca secara menyeluruh dan tidak secara berasingan untuk mendapatkan maknanya. Adalah dikatakan bahawa perkara 114 hendaklah dibaca bersama perkara 160(1) dan s 33C Jadual Kesebelas Perlembagaan sepertimana diputuskan dalam *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors*; dan (2) sekiranya parlimen berniah bahawa kesemua tujuh ahli perlu hadir, ianya akan memasukkan peruntukan koram untuk menentukan bilangan ahli yang akan membentuk satu koram.

Diputuskan, mengetepikan permohonan tanpa kos:

(1) Ketiadaan peruntukan koram dalam perkara 114(1) menunjukan bahawa parlimen tidak fikirkan ianya wajar untuk membuat peruntukan sedemikian. Sebab mengapa parlimen tidak menetapkan koram dalam perkara 114(1) adalah untuk memberikan Suruhanjaya Pilihanraya keberkesanan menjalankan urusan untuk memastikan kuasa dan prosidingnya tidak dipengaruhi oleh kekosongan yang mungkin timbul. Suruhanjaya Pilihanraya mempunyai tanggungjawab statutori antara yang lain untuk menjalankan pilihanraya dalam jangka masa yang ditetapkan. Pentafsiran yang diberi plaintif kepada perkara 114(1) akan membawa kepada keputusan yang tidak praktikal dan tidak masuk akal, kerana tugas Suruhanjaya Pilihanraya akan terhenti sekiranya kesemua tujuh ahli hendaklah hadir (lihat perenggan 13).]

Notes

For cases on Election Commission in general, see 6(2) *Mallal's Digest* (5th Ed, 2015) paras 2191–2194.

For cases on election in general, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2721–2725.

Cases referred to

Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] 4 MLJ 656, CA (folld)

Legislation referred to

Federal Constitution arts 114, 114(1), 160(1), Eleventh Schedule, s 33C, Thirteenth Schedule, s 5

Judicial Appointments Commission Act 2009 ss 5(1), 13, 13(4), (5)

Shaharudin bin Datuk Hj Ali (Mohd Khairul Azam bin Abdul Aziz with him) (Azam Aziz Shaharuddinali & Co) for the plaintiff.
Amerjeet Singh a/l Sarjit Singh (Suzana bt Atan and Azizan bin Md Arshad with him) (Attorney General's Chambers) for the defendant.

SM Komathy J:

[1] The primary issue in these proceedings is whether a Election Commission meeting convened on 18 January 2019 ('the meeting') was held in violation of art 114(1) of the Federal Constitution which deals with the composition of the Election Commission. This issue has arisen because the Chairman was the sole person present at the meeting as the other members of the Election Commission had resigned and the vacancies had not been filled up at the time.

SALIENT BACKGROUND FACTS

[2] The essential facts to be garnered from the affidavits filed fall to be stated within a short compass. On 11 January 2019, the seat for the state constituency of Semenyih became vacant following the death of its assemblyman. The Election Commission was informed by the Speaker of the State Legislative Assembly of Selangor of the vacancy. On 18 January 2019, the Election Commission held the impugned meeting to take the necessary action according to law to hold a by-election for the constituency.

[3] The Election Commission is a Commision that constitutes of seven members. The meeting was chaired by the Chairman of the Election Commission in the absence of the other Commissioners owing to the fact that at that date there were six vacancies in the Commission yet to be filled. The Election Commission fixed the required dates for the by-election to be held. These included the date of issuance of the writ of election, the nomination day, the advance polling day and the polling day.

[4] The plaintiff is a registered voter for the state constituency of Semenyih. On 8 February 2019, she commenced this action against the defendants' by way of an originating summons seeking, inter-alai, the following reliefs:

(a) a declaration that the Election Commission was an unconstitutional entity from 1 January–8 February 2019 in violation of art 114(1) of the Federal Constitution;

(b) a declaration that the meeting of the Election Commission held on 18 January 2019 and Chaired by the chairman without the deputy chairman and five other members was unconstitutional for violating art 114; and

(c) a declaration that the decisions taken at the said meeting were unlawful and not enforceable.

[5] On 14 February 2019, five of the vacancies were filled leaving one vacancy yet to be filled.

CONTENTIONS OF THE PARTIES

[6] The contentions of the plaintiff 's counsel can be summarised as follows:

(a) that on a proper construction of art 114(1), the Election Commission as an entity under art 114(1) is only lawful if it consists of the seven members stipulated therein; a chairman, a deputy chairman and five other members.

(b) the Election Commission at the date of the impugned meeting was not validly constituted as it consisted only of the chairman;

(c) the Chairman of the Election Commission cannot carry out any of the constitutional functions of the Election Commission on his own. In the absence of a quorum provision, all seven members must be present in order to make a valid decision; and

(d) the court should decline to follow the decision of the Court of Appeal in *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656 that all seven members of the Election Commission need not be present.

[7] The defendants', on the other hand, submitted that the construction given by the plaintiff to art 114 was erroneous as it is based on considering art 114(1) in isolation. It was argued that is an established cannon of constitutional construction that the Constitution must be read as a whole and not in isolation to ascertain its meaning. It was said that art 114 must be read together with art 160(1) and s 33C of the Eleventh Schedule to the Federal Constitution as was decided in *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors*.

[8] The defendants further argued that if Parliament had intended that all seven members must be present, it would have included a quorum provision to specify the number of its members which are to constitute a quorum.

STATUTORY PROVISIONS

[9] The statutory provisions that are relevant for the disposal of this application are:

Article 114(1)

The Election Commission shall be appointed by the Yang di-Pertuan Agong after consultation with the Conference of Rulers, and shall consist of a chairman, a deputy chairman and five other members.

Article 114(7)

Where, during any period, the chairman of the Election Commission has been granted leave of absence by the Yang di-Pertuan Agong or is unable, owing to his absence from the Federation, illness or any other cause, to discharge his functions, the deputy chairman shall discharge the functions of the chairman during that period, and if the deputy chairman is also absent or unable to discharge such functions, a member of the Election Commission may be appointed by the Yang di-Pertuan Agong to discharge the functions of the chairman during that period.

Article 160(1)

The Interpretation and General Clauses Ordinance 1948 [*M.U. No. 7 of 1948*], as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of this Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agong for references to the High Commissioner.

S33C of the 11th Schedule to the Federal Constitution

Where by or under any written law any board, commission, committee or similar body, whether corporate or in incorporate, is established, then, unless the contrary intention appears, the powers and proceedings of such board, commission, committee or similar body shall not be affected by —

(a) any vacancy in the membership thereof;

(b) ...

...

PEGUAM NEGARA MALAYSIA V NURUL IZZAH BT ANWAR

[10] The Court of Appeal in *Peguam Negara Malaysia v Nurul Izzah bt Anwar* dealt with the issue at hand. There, the Election Commission conducted a local enquiry during a delineation exercise as mandated under s 5, Thirteenth Schedule of the Federal Constitution. The enquiry was conducted by five members of the Election Commission. The defendant sought leave to commence judicial review proceedings seeking to challenge the enquiry as not all seven members were present at the enquiry as required by art 114(1). The positions of the deputy chairman and one other member were vacant at the material time. The High Court granted leave. In setting aside the leave, the Court of Appeal explained as follows:

The argument before us on the first complaint centered around the legality of the local enquiry in which we were pressed by learned counsel that it was not lawfully constituted as only five out of the seven members of the EC were present thereat.

A The respondents therefore were not heard before the EC at the local enquiry in question. The issue arose as the irrefragable fact showed that during the said local enquiry, the post of the deputy chairman and the post of one member of the EC were vacant. Nevertheless, the learned senior federal counsel, on behalf of the appellant, advanced the most compelling argument against this ground stating that
B contrary to the respondents' submission, there were specific provisions in the Federal Constitution which allowed the EC to function lawfully in the event of vacancies in their numbers. The first provision is found in art 160 cl (1) read with s 33C of the Eleventh Schedule to the Federal Constitution. Article 160 cl (1) states
...
C While section 33C in the Eleventh Schedule reads;
...
Reference in relation to this point may also be made to art 114 cl (7) which is reproduced below:
D ...
These provisions in our judgment, have unambiguously evinced a legislative intention that the EC is allowed to exist even if it consists of less than seven members and continue to function lawfully in the event of vacancies in the membership thereof. Thus, the powers and proceedings of the EC are clearly not affected by any
E vacancy in their numbers. This legal position has not been convincingly refuted by the respondents. In the event, we found that the respondents' ground under consideration that seven members must be present at the local enquiry was wholly misconceived in law.

F **[11]** The plaintiff's counsel argued that the decision of the Court of Appeal decision was wrong as it had failed to examine and consider the critical words in s 33C that read 'unless the contrary intention appears'. It was submitted that 'the contrary intention' is found in art 114(1) which mandates that all seven members must be present. The court's decision to rely on s 33C to hold that all
G seven members need not be present was accordingly flawed.

[12] With respect, this court is bound by the judgment of the Court of Appeal and cannot depart from it. In any event, in my view, the decision there
H is correct. It cannot be gainsaid that Parliament is thoroughly familiar with appointing commissions, tribunals and with the requisite quorums. It is pertinent in this connection to note that under the Judicial Appointments Commission Act 2009, the constitution of the commission is set out in s 5(1) of the Act. And, sub-ss (4) and (5) to s 13 of the Act incorporate a quorum
I provision that read:

(4) The quorum of the Commission shall be seven including the Chairman.

(5) If the quorum as provided by subsection (4) is not present due to members being disqualified under section 11 or 25, then the quorum shall under section 11 or 25, then the quorum shall not be less than five.

[13] The absence of any such quorum provision in art 114(1) points strongly to the view that Parliament did not think it necessary to make such provision. The reason why parliament has not prescribed a quorum in art 141(1), in my judgment, is to give the Election Commission business efficacy to ensure that its power and proceedings are not affected by any vacancy that may arise. The Election Commission has a statutory duty, among others, to conduct elections within specified timelines. The construction given by the plaintiff to art 114(1) will lead to impractical, if not absurd, results as the work of the Election Commission would frequently be brought to a standstill if all seven members must be present.

[14] I therefore agree with the defendant that this court should give art 114(1) the meaning which accords with the intention of Parliament as gathered from the provision being read with art 160(1) and s 33C of the Eleventh Schedule to the Federal Constitution.

CONCLUSION

[15] For the reasons stated, I am unable to countenance the submission of the plaintiff that the Election Commission meeting of 18 January 2019 was unconstitutional and a nullity by reason of the fact that the other members did not take part in it. The application is therefore dismissed with no order as to costs.

Application dismissed with no order as to costs.

Reported by Izzat Fauzan